COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2899-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JASON C. KINSTLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront, and Frankel,[1] JJ.

FRANKEL, J. Jason Kinstler appeals from a judgment convicting him of fourth-degree sexual assault and being a party to the crime of child abuse.

[1]Circuit Judge Mark A. Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

After the trial court denied a defense motion to suppress the results of a search of Kinstler's residence on constitutional grounds, he entered guilty pleas to the charges and pursued this appeal pursuant to § 971.31(10), STATS.[2] On appeal, the State confessed that the trial court erroneously denied the defendant's motion to suppress evidence. Kinstler then moved for summary reversal pursuant to Rule 809.21 on the basis of the State's confession of error. We conclude that Kinstler's motion for summary reversal should be granted and the case remanded to the trial court in order to allow Kinstler to withdraw his guilty pleas.

La Crosse County deputy sheriff Michael Horstman testified that on the evening of March 15, 1996, four deputy sheriffs were dispatched to Kinstler's trailer in response to a complaint of a loud stereo and possible underage drinking. Approaching the trailer they heard noise, and arriving at the trailer they saw, through a window, several cans of beer in the kitchen area, what appeared to be a liter-sized bottle of alcohol, and occupants who looked teen-aged or slightly older.

The deputies knocked on the door, and an individual who identified himself as Brian Melvin appeared. They asked if they could enter and Melvin invited them in. At the time of entry, no one else was in sight. Melvin advised that he was not the owner of the trailer. The deputies determined that Melvin was underage and appeared to have been drinking. Deputy Horstman asked Melvin if he would get the owner and at this time Kinstler appeared from the back bedroom area. Kinstler also appeared to have been drinking. The deputies inquired if

[2] Section 971.31(10), STATS., provides: "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty."

others were in the trailer and Kinstler said he would get them. Kinstler returned with two people.

The deputies suspected that more people were hiding in the trailer. As Horstman, who had investigated "several hundred" underage drinking complaints, testified, "It's common in underage drinking parties that anyone underage remains hidden in an attempt to avoid being cited for underage drinking." The deputies asked permission to search for additional people, but Kinstler declined. Horstman advised Kinstler that he intended to check the trailer anyway and Kinstler agreed to accompany him. Upon entering Kinstler's bedroom, the deputies found an unconscious female. The complaint alleged that she had vomit on her face, had coagulated blood in her nostrils, did not appear to be breathing, and had only a faint pulse. Horstman sought and obtained a warrant to search both Kinstler and the trailer for evidence of alcohol consumption and sexual assault of the female found in Kinstler's bedroom. Prior to discovering the female in Kinstler's bedroom, the deputies had no evidence of a sexual assault.

The trial court denied the motion to suppress the results of the search on grounds that the warrantless search of Kinstler's trailer was reasonable in light of common knowledge that underage drinkers hide from police. The court also reasoned that because underage drinkers frequently drink to the point of unconsciousness, the deputies had a reasonable concern for the welfare of those who might have been hiding. The trial court ultimately concluded that the minimal intrusion into the Kinstler's privacy was outweighed by the public welfare concerns implicit in investigating underage drinking.

Any time the State confesses error in a criminal case it is responsible for prosecuting, that confession is entitled to great weight. The State's concession

that the search of Kinstler's trailer was unconstitutional, however, is a question of law we are not bound to accept on this appeal. ***State v. Gomaz***, 141 Wis.2d 302, 307, 414 N.W.2d 626, 629 (1987). We will therefore independently review the validity of the search.

I. Scope of Search

The parties disagree as to the scope of the search challenged on this appeal. The State, while conceding that the search of Kinstler's bedroom was invalid, maintains that Kinstler waived his right to challenge the initial entry into the trailer by not explicitly raising such a challenge in the trial court. Kinstler replies that his motion to suppress impliedly challenged the deputies' initial entry into the trailer as well as the subsequent search of his bedroom. Our review of the record supports the State's assertion that trial counsel chose to challenge only the search of the bedroom and not the initial entry.

The motion sought to suppress all evidence derived from "the search of defendant's trailer on or about March 15, 1996 ... on the grounds that the search was conducted without a warrant, and without consent." The motion stated that, once inside the trailer, the deputies sought permission to search the trailer and advised Kinstler they were going to search the trailer in spite of his refusal to consent. The motion then specified, "It is the *subsequent search* that is the subject of this motion" (emphasis supplied).[3] The evidentiary hearing held on the suppression motion did not focus on the validity of the initial entry.

[3]Contrary to Kinstler's position in his reply brief, the legal portion of his trial court motion assumed that Melvin had given the deputies permission to enter but went on to argue that Melvin's consent was limited to the initial entry and did not encompass the subsequent search.

In ***State v. Caban***, 210 Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997), the supreme court ruled that Fourth Amendment challenges must be raised and litigated in the trial court with some specificity or be deemed waived on appeal. Caban had challenged the warrantless post-arrest search of his vehicle, which yielded marijuana, on broad Fourth Amendment grounds. At the suppression hearing, Caban questioned whether the search had been incident to a valid arrest and within the scope of a search warrant for the residence where he had been arrested.[4] He did not challenge the existence of probable cause for the search of his vehicle, however. On appeal, we considered the probable cause issue, despite Caban's failure to raise it below. *See* ***State v. Caban***, 202 Wis.2d 416, 551 N.W.2d 24 (Ct. App. 1996), *rev'd*, 210 Wis.2d 597, 563 N.W.2d 501 (1997).[5]

The supreme court reversed, holding that Caban, by failing to raise the specific Fourth Amendment challenge either in his written motion or at the evidentiary suppression hearing, failed to preserve the issue of probable cause to search for appellate review. ***Caban,*** 210 Wis.2d at 608, 563 N.W.2d at 506. The court went on to hold that the burden falls on the defendant to show, with references to the trial court record, that he has raised the issue in the trial court. This holding is consistent with the general rule that issues, including constitutional

[4]At the evidentiary hearing, Caban also objected to the prosecutor's questions regarding probable cause to search the vehicle. This affirmative limitation of the issue before the trial court is analogous to Kinstler specifying that his motion pertained to the search subsequent to the initial entry.

[5]The majority, however, did not agree on the rationale for declining to find waiver. ***State v. Caban***, 202 Wis.2d 416, 429, 551 N.W.2d 24, 29 (Ct. App. 1996) (Gartzke, P.J., concurring), *rev'd*, 210 Wis.2d 597, 563 N.W.2d 501 (1997).

challenges, not presented in the trial court will not be heard for the first time on appeal. ***State v. Gove,*** 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989).

The record before us confirms that Kinstler has failed to meet his burden to establish that he raised the issue of the validity of the initial entry into the trailer either in his written motion or at the suppression hearing in the trial court. As a result, he has waived his right to raise this issue on appeal. Nothing has been presented that suggests we ought to exercise our discretionary authority to consider this issue under § 751.06, STATS.

II. Validity of Search of Kinstler's Bedroom

It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***United States v. United States District Court***, 407 U.S. 297, 313 (1972). And a principal protection against such intrusions is the warrant the Fourth Amendment requires of government agents who seek to enter the home for purposes of search or arrest. *See* ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948). It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." ***Welsh v. Wisconsin***, 466 U.S. 740, 748-49 (1984) (quoting ***Payton v. New York***, 445 U.S. 583, 586 (1979)).

Because the search of Kinstler's residence took place without a search warrant, this search must be presumed unreasonable unless we are persuaded that extenuating circumstances justified an exception to the Fourth Amendment warrant requirement. ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998) (evidence seized during a warrantless search of one's home is inadmissible without a well-delineated, judicially recognized exception to

the warrant requirement). We will review some recognized exceptions to the warrant requirement to determine whether they might justify the warrantless search in this case. ***State v. West***, 185 Wis.2d 68, 89-90, 517 N.W.2d 482, 489-90 (1994).

*Exigent Circumstances***.** Police officers who have probable cause to believe that a crime has been committed may dispense with the search warrant if exigent circumstances are present. ***State v. Kiekhefer***, 212 Wis.2d 460, 475, 569 N.W.2d 316, 325 (Ct. App. 1997). They include the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. ***Minnesota v. Olson***, 495 U.S. 91, 100 (1990) (citations omitted).

Such an exigency was clearly lacking in this case. The deputies were investigating relatively minor offenses, were unaware a sexual assault may have occurred and had no reason to believe that evidence was about to be destroyed or that a search warrant could not reasonably be obtained.

*Emergency***.** Police are not constitutionally prohibited from taking action in situations where they legitimately perceive the potential for a genuine emergency. ***State v. Dunn***, 158 Wis.2d 138, 144, 462 N.W.2d 538, 540 (Ct. App. 1990). In order to dispense with the warrant requirement on the basis of an emergency, case law provides that a two-step inquiry be undertaken. ***State v. Boggess***, 115 Wis.2d 443, 450-51, 340 N.W.2d 516, 521 (1983). An emergency that will obviate the need for a warrant requires both a finding that the officer is actually motivated by a need to render aid (a subjective test) and a conclusion that a reasonable person under the circumstances would have perceived an emergency to exist (an objective test). ***Id***. at 451, 340 N.W.2d at 521. The exception is

inapplicable if the government officials are motivated by a need or desire to obtain evidence for possible prosecution. ***State v. Pires***, 55 Wis.2d 597, 604, 201 N.W.2d 153, 156 (1972). This narrow exception to the warrant requirement is clearly not established here under either of the ***Boggess*** criteria. The deputies testified they wanted to search the rest of the trailer because underage drinkers frequently hide to avoid arrest. The deputies had no information that a medical or other physical emergency existed involving the female found unconscious in Kinstler's bedroom—or anyone else. *See* ***State v. Kraimer***, 99 Wis.2d 306, 324, 298 N.W.2d 568, 576 (1980).

Community Caretaker Responsibility. In upholding the search of Kinstler's bedroom, the trial court seemed to rely on a community caretaker exception, though it did not cite it by name. Professor LaFave states:

> In addition to their crime prevention and crime detection upon to render a great variety of other public services. In carrying out these varied responsibilities, the police sometimes conduct searches for some purpose other than that of finding evidence of criminal activity. Generally, it responsibilities, police are by design or default called may be said that the courts have upheld such searches when made reasonably and in good faith, even though evidence of crime is inadvertently discovered as a consequence.

State v. Whitrock, 161 Wis.2d 960, 992, 468 N.W.2d 696, 710 (1991) (quoting 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 5.5(d) at 552 (2d ed. 1987) (footnotes omitted).

When a community caretaker function is asserted as justification for a Fourth Amendment intrusion, the trial court must determine: (1) that a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the

individual. ***State v. Anderson***, 142 Wis.2d 162, 169, 417 N.W.2d 411, 414 (Ct. App. 1987).

This case bears a remarkable similarity to the facts of ***State v. Dull***, 211 Wis.2d 651, 565 N.W.2d 575 (Ct. App. 1997). Deputy sheriffs responded to a noise complaint and arrested Dull's younger brother for underage drinking in front of Dull's home. The deputies asked to go inside in order to locate an adult relative. The juvenile gave ambiguous consent to enter the house, and a deputy entered Dull's bedroom without express consent and found Dull in bed with an underage female. The court of appeals found the deputy's role as a community caretaker ended when he determined that the juvenile was intoxicated and took him into custody pursuant to the Juvenile Justice Code. Section 938.19(1)(d)8, STATS. At this point, the court determined that the deputy had returned to his traditional law enforcement role; he was enforcing the state's beverage control laws. ***Dull***, 211 Wis.2d at 658, 565 N.W.2d at 579.

Similarly in the case at hand, the deputies were ferreting out criminal conduct rather than engaging in supplemental community caretaking activities. The difficulty with applying the community caretaker exception to the facts of this case is that the deputies gave no indication at the suppression hearing that they were engaged in anything other than searching for underage drinkers. While in retrospect their efforts may have well served a potential crime victim, happening to render a valuable community service in the course of searching for criminal evidence does not justify an otherwise invalid search. Because we conclude that the deputies were not engaged in a *bona fide* community caretaker function, we need not address the question of whether the public interest in their conduct outweighed the intrusion on Kinstler's privacy.

Consent. We next consider whether the deputies entered Kinstler's bedroom with consent. A consent search is constitutionally reasonable to the extent that the search remains within the scope of the actual consent. ***State v. Rogers***, 148 Wis.2d 243, 248, 435 N.W.2d 275, 277 (Ct. App. 1988). Officers pursuing an investigation into possible criminal activity are subject to the presumption that their invitation to enter a private home is limited to the room they are brought into. ***State v. Amrine***, 157 Wis.2d 778, 783, 460 N.W.2d 826, 827-238 (Ct. App. 1990). There is no dispute on this record that the deputies had Melvin's consent to enter the trailer initially. Once inside, they sought further consent from Kinstler, the owner, to search the rest of the trailer, and Kinstler expressly declined to give his consent. The deputies were therefore limited to the scope of the initial consent to enter. When they sought and were refused further consent from the owner of the property, they had no further authority under the Fourth Amendment to search the trailer for any purpose. By proceeding to search Kinstler's bedroom without his consent, the deputies clearly exceeded the scope of whatever initial consent they had received from Melvin.

By the Court—Judgment reversed and cause remanded with directions.

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